Oon Hoon Wah v Noble Global Sdn Bhd & Ors

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HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KCH-24–74/5 OF 2013
RHODZARIAH BUJANG J
25 JULY 2013

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Companies and Corporations — Oppression — Conduct amounting to oppression — Allegation that plaintiff was promised substantial amount of shares in company — Plaintiff's shareholding reduced to 10% when company increased paid up capital — Plaintiff subsequently removed as director — Whether actions of Board members constituted oppression — Companies Act 1965 s 181

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This was an action of a feuding family where the son ('the plaintiff') sued his parents ('the third and fourth defendants') and his sister ('the fifth defendant'). The first defendant was a company which cultivated oil palm seedling while the second defendant was a company which ran the business of paper-packing. The plaintiff claimed that it was his idea to convert the first defendant's business to plastic waste recycling and it was his effort which saw the company being granted a licence from the Department of Environment to collect and sell scheduled waste to an approved recovery plant. Before and at the time when the recycling business kicked off, the plaintiff alleged that he was promised a 50% shareholding in the first and second defendants companies. He was given 50,000 shares in the first defendant when he joined the first defendant company and 30% of the second defendant's shares when it was incorporated. However, his shareholding in the first defendant company was reduced to 10% when the said company increased its paid up capital without his knowledge. In an extraordinary general meeting of the first defendant, the plaintiff was removed as a director and this was followed by his removal as a director in the second defendant as well. His share was also diluted to 7.5% without his knowledge and consent. In the present action, the plaintiff claimed that the defendants actions constituted oppression under s 181 of the Companies Act 1950. In refuting the allegations, the defendants argued that the shares in the companies were a gift and contrary to what the plaintiff alleged, he did not contribute to the success of the two companies. Instead the defendants alleged that the plaintiff had stolen the companies computer hard disks and documents and further contended that the plaintiff was in breach of his fiduciary duties by using the first defendant's funds to set up a business to compete with the two defendant companies.

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Held, dismissing the application with costs of RM8,000:

(1) The promise of 50% shares in the two companies by the defendant father

could not amount to oppression. The promise was not inked in an agreement and in itself could not constitute an intention to create a legal relationship which was enforceable by a court order. The plaintiff was a filial son who dutifully accepted his father's words and after the relationship turned ugly, the utterance of his father that he could have his share in the land from his will after he died encapsulate what that promise was, which was no better than any other parental promise made to extract good behaviour from one's offspring (see para 8).

(2) These were family-owned companies started by the family patriarch. There were three directors for each defendant company. Obviously when two directors could not see eye to eye, there would be a deadlock in the management. In this case, the removal of the son was pursuant to a properly constituted extraordinary general meeting and the majority in the two companies have spoken against him. There was no reason why the views of the majority should be silenced or should not be respected (see para 12).

(3) It was a little too late in the day to bring up the issue of transfer of land as it was done in October 2007 and the son made no complaints of it within a reasonable time after the transaction. He only raised it now when his request for a share in the land following his father's earlier promise to him that he would be given it was turned down. Further, for this alleged illegality the proper victim was the first defendant, not him. Thus, he could not be said to have been oppressed by the alleged use of company's funds by his father and the latter's failure to honor his promise for the share in the land fell under the same consideration as the earlier discussed failed promise on the 50% shares in the two companies (see para 14).

[Bahasa Malaysia summary

Ini adalah tindakan keluarga yang bersengketa yang mana anak lelaki ('plaintif') menyaman ibu bapanya ('defendan ketiga dan keempat') dan saudara perempuannya ('defendan kelima'). Defendan pertama adalah syarikat mengusahakan anak benih kelapa sawit sementara defendan kedua adalah syarikat yang menjalankan perniagaan kertas pembungkusan. Plaintif mendakwa bahawa adalah ideanya untuk menukarkan perniagaan defendan pertama kepada kitar semula sisa plastik dan adalah usahanya yang menyebabkan syarikat mendapat lesen daripada Jabatan Alam Sekitar untuk mengutip dan menjual buangan terjadual kepada loji kilang pemulihan yang diluluskan. Sebelum dan pada masa perniagaan kitar semula bermula, plaintif mendakwa dia dijanjikan 50% pemegangan saham di dalam syarikat defendan pertama dan kedua. Dia diberikan saham sebanyak 50,000 dalam defendan pertama apabila dia menyertai syarikat defendan pertama dan 30% saham daripada defendan kedua apabila ia ditubuhkan. Walau bagaimanapun, pemegangan sahamnya di dalam syarikat defendan pertama dikurangkan kepada 10% apabila syarikat tersebut menambahkan modal berbayarnya tanpa

pengetahuan plaintif. Di dalam mesyuarat agung luar biasa defendan pertama, plaintif dikeluarkan daripada menjadi pengarah dan juga diikuti dengan pembuangannya sebagai pengarah di dalam syarikat defendan kedua. Sahamnya dikurangkan kepada 7.5% tanpa pengetahuan dan izinnya. Dalam tindakan ini, plaintif mendakwa bahawa tindakan defendan-defendan merupakan penindasan di bawah s 181 Akta Syarikat 1965. Dalam menyangkal tuduhan-tuduhan tersebut, defendan-defendan berhujah bahawa saham-saham di dalam syarikat adalah hadiah dan bertentangan dengan apa yang dituduh oleh plaintif, dia tidak menyumbang kepada kejayaan kedua-dua syarikat. Sebaliknya defendan-defendan mendakwa bahawa plaintif telah mencuri cakera keras komputer serta dokumen dan selanjutnya berhujah bahawa plaintiff memungkiri tugas fidusiarinya dengan menggunakan dana defendan pertama untuk menubuhkan perniagaan untuk bersaing dengan kedua-dua syarikat defendan.

Diputuskan, menolak permohonan dengan kos sebanyak RM8,000:

(1) Janji 50% saham oleh defendan bapa tidak boleh terjumlah kepada penindasan. Janji itu tidak ditandatangani di dalam perjanjian dan dengannya sendiri tidak boleh membentuk niat untuk membentuk hubungan undang-undang yang boleh dikuatkuasakan oleh perintah mahkamah. Plaintif adalah anak yang taat yang dengan patuh menerima kata-kata bapanya dan selepas hubungan berubah keruh, pernyataan bapanya bahawa dia boleh memperolehi bahagiannya di dalam tanah daripada wasiatnya selepas dia meninggal dunia merumuskan apa janji tersebut, yang mana adalah tidak lebih daripada janji yang dibuat oleh ibu bapa agar anaknya berkelakuan baik (lihat perenggan 8).

(2) Ini adalah syarikat yang dimiliki oleh keluarga dimulakan oleh bapa sebagai ketua keluarga. Terdapat tiga pengarah untuk setiap syarikat defendan. Adalah nyata apabila dua pengarah tidak bersefahaman, akan terdapat jalan buntu di dalam pengurusan syarikat. Dalam kes ini, penyingkiran anak lelaki adalah berikutan mesyuarat agung luar biasa yang dijalankan dengan betul dan pihak majoriti di dalam dua syarikat telah menentangnya. Tidak terdapat alasan mengapa pandangan majoriti patut ditempelak atau tidak patut dihormati ((lihat perenggan 12).

(3) Adalah agak terlewat untuk mengemukakan isu pemindahan tanah kerana ia dilakukan pada Oktober 2007 dan plaintif tidak membuat sebarang aduan mengenainya dalam masa yang munasabah selepas transaksi tersebut. Dia hanya membangkitkannya sekarang apabila permintaannya untuk bahagian di dalam tanah berikutan janji bapanya terdahulu kepada plaintif bahawa dia akan mendapat bahagian yang dijanjikan ditolak. Selanjutnya, untuk dakwaan kepenyalahan undang-undang mangsa yang sebenar adalah defendan pertama bukan plaintif. Maka, plaintif tidak boleh dikatakan telah ditindas dengan

dakwaan penggunaan dana syarikat oleh bapanya dan kegagalan bapanya untuk mengotakan janji untuk bahagian di dalam tanah terangkum dalam pertimbangan yang sama seperti janji gagal yang dibincangkan terdahulu tentang 50% saham di dalam kedua-dua syarikat (lihat perenggan 14).]

Notes

For cases on conduct amounting to oppression, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 687–688.

Cases referred to

Balfour v Balfour [1919] 2 KB 571, CA (refd)
Chootiong Hin & Ors v Choo Hock Swee [1959] 1 MLJ 67, CA (refd)
Kong Thai Sawmill (Miri) Sdn Bhd Kong Thai Sawmill (Miri) Sdn Bhd & Ors, Re v Ling Beng Sung [1978] 2 MLJ 227, PC (refd)
Pan Pacific Construction Holdings Sdn Bhd v Ngui-Kee Corporation (M) Bhd & Anor [2010] 6 CLJ 721, FC (folld)
Saul D Harrison & Sons plc, Re [1995] 1 BCLC 14, CA (refd)
Sim Soi Lek @ Sim Kuan Hua v Sim Sui Tee & Anor (OS No KCH-24–89/7 of 2012) (unreported) (refd)

Legislation referred to

Companies Act 1965 s 181

James Lo (James Lo Advocate) for the plaintiff.
Parameswary d/o Shanmugam (Arthur Lee, Lin & Co) for the defendant.

Rhodzariah Bujang J:

[1] In essence, this action is about a feuding family. The plaintiff is the son, suing his parents (the third and fourth defendants) and his sister (the fifth defendant). The first and second defendants are family owned enterprises and the plaintiff in his prayer in the originating summons is seeking to declare that he is entitled to hold 50% of the share in these two companies and following that declaration, for his father to then purchase those shares at a price to be determined by Messrs Chantiran & Co. The alternative prayer is to wind up the two companies. The basis for this action is the son's claim that he was instrumental in building up the two companies into profitable ventures and was earlier promised by his father 50% shares in the companies but instead his 20% share and 30% shares in the two companies were diluted to 10% and 7.5%, respectively. The dilution came about when the companies paid up shares were increased by his father and without his knowledge and consent, he alleged. He was further removed as a director of the companies and what is more he alleged that his parents and sister were disposing of the first company's

assets without his knowledge and consent. To him, all these and more (which will be mentioned later in this judgment) constitute oppression under s 181 of the Companies Act 1965.

THE BUSINESSES

[2] The original business of the first defendant company was cultivation of oil palm seedling and that of the second defendant company was paper packing. According to the son, it was his idea to convert the first defendant's business to plastic waste recycling and it was his effort which saw the company being granted a licence from the Department of Environment to collect and sell scheduled waste to an approved recovery plant. Other relevant permits and licences were subsequently granted to the first defendant, all through his effort, said the son. Before and at the time when the recycling business of the first defendant company was initiated in 2004 to 2005, the son said he was promised a 50% share holding in the company as well as that of the second defendant company. He was given 50,000 shares in the first defendant when he joined the first defendant company in 2004 and 30% of the second defendant's shares in 2005 when it was incorporated. Two other companies were incorporated by the family in 2006 and 2009, Global Waste Recovery Sdn Bhd and Bigtrend Corp Sdn Bhd and both companies have been wound up by none other then myself following applications made by the son in two separate actions (CWU No 28–20/5 of 2012 and CWU No 28–19/5 of 2012, respectively).

[3] Then, according to the son, in or around 12 September 2006, his shareholding in the first defendant company was reduced to 10% when the said company increased its paid up capital without his knowledge. All he knew was being asked to sign blank resolutions pertaining to the company. Further deterioration of his relationship with his family herein came about when the son discovered that the first company's funds were used by his father to acquire shares in a piece of land which were jointly owned by his mother, sister and another brother and did not give him a share in the land although he was instrumental in getting the land use to be converted from agricultural to industrial. Then in May 2011, things fell apart when at an extraordinary general meeting of the first defendant, attended by his family herein and the company's secretary, he was removed as a director. They followed this with his removal as the second company's director and a dilution of his share in that company to just 7.5% when they increased its share capital, again without his knowledge and consent. He further alleged that he was not paid any dividends from his shareholding in the two companies.

[4] The father refuted the allegation of oppression and discrimination alleged by his son. He deposed his first affidavit in opposition basically to say

that shares in the companies were his gifts to his son and that contrary to what the son had alleged, he did not contribute to the success of the two companies. Instead, he accused him of stealing the companies' computer hard disks and documents and had on 21 June, 2011 lodged a police report against him. He also contended that his son was in breach of his fiduciary duties by engaging in a business with one Alex Ang, called HOGA which he set up using the first defendant's funds and that business competes with the two defendant companies. Another company he set up, GAHO is also a competitor and further, the son had also use the two companies' funds to buy goods from Italy which the two companies never received and had committed deception on the companies by conspiring with a managing director of another company, Victory Recovery Sdn Bhd.

[5] His brother also affirmed an affidavit in opposition to say that he sold his shares in the land to his father because he needed the money to set up his own business in Kuala Lumpur and confirmed what his father had said in his affidavit that they were all, including his brother, paid salaries, given cars, houses and allowances as directors of the two companies when in fact his brother contributed nothing in the setting up of the two companies but were given the paid up shares in them, free of charge. There was no affidavit in reply filed by his brother to this affidavit nor to that of their father. His counsel, Mr James Lo said these allegations of the father and brother were not relevant to the issue of oppression raised by him. Though I agree that some of the brick-bats thrown against the son's father-in-law and his wife are not relevant, that against his fraudulent conduct and abuse of power or incompetency as a director are. However, despite Mr James Lo saying that he was raising a preliminary objection against the relevancy of the allegations, I was not asked to rule on it. At the end of his letter dated 5 June, 2013, giving notice to his opposing counsel, of the preliminary objection on the relevancy of the matters raised in the affidavits in opposition, he said he reserves the right to file an affidavit in reply if I deemed it necessary. Nevertheless, on the day of hearing of the originating summons, Mr James Lo was ready with the full submission for the originating summons proper and that being the case it would be improper for me to order the filing of the affidavit in reply. Since such course of conduct has been adopted by them, I would proceed now with the application proper based on the affidavits as they were.

THE PAN PACIFIC'S CASE

[6] Both counsel have cited to me the Federal Court case of *Pan Pacific Construction Holdings Sdn Bhd v Ngui-Kee Corporation (M) Bhd & Anor* [2010] 6 CLJ 721 which has defined acts which constitute a cause of action under s 181 of the Companies Act 1965. Of course the other celebrated case on this section duly considered in *Pan Pacific*'s case is that of *Re Kong Thai Sawmill*

(Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung [1978] 2 MLJ 227 which decision was quoted at length by Mr James Lo in his written submission and which I must also allude to in this judgment on the strength of the profoundness of Lord Wilberforce's statement, directly relevant to this case.

[7] Coming back to *Pan Pacific*'s case Richard Malanjum CJ (Sabah and Sarawak) summarised at p 735 of the report that s 181 permits judicial remedy on four categories of conduct, namely, oppressive conduct, conduct in disregard of interests, unfairly discriminatory conduct or prejudicial conduct. It may also be noted, said His Lordship that from the wordings of s 181, its basic theme is 'unfairness'. However, His Lordship cautioned further, that unfairness does not mean that the judge can do whatever he happens to think fair. He must apply the concept of fairness judicially and act upon rational principles. Quoting from *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, His Lordship reminded us that unfairness under this section is to be used in the context of a commercial relationship. In other words, what is so commercially unfair about the conduct of the alleged oppressor which would attract the operation of s 181.

THE UNKEPT PROMISE

[8] Straightaway and without wasting more breaths, I am able to say that the promise of 50% shares in the two companies by the father cannot amount to oppression. The promise was not inked in an agreement and in itself cannot constitute an intention to create a legal relationship which is enforceable by a court order as prayed for by the son in prayer (a) and (b) of his originating summons. As he himself said in his affidavit in support, para 14 thereof, he was a filial son who dutifully accept his father's words and after the relationship turn ugly, the utterance of his father that he can have his share in the land (mentioned earlier) from his will after he died encapsulate what that promise was, which is no better than any other parental promise made to extract good behaviour from one's offspring.

[9] I would even venture to say that if all such promises are enforceable by court orders, we in the courts would have our work cut out for us. I must also add that the son here is not the first to try to enforce a family arrangement before me but with the same dismal result. There was one earlier case which I heard, *Sim Soi Lek @ Sim Kuan Hua v Sim Sui Tee & Anor* (OS No KCH-24–89/7 of 2012) and the arrangement was even better as there was a written agreement which was for the first defendant to transfer a piece of land to his brother, the plaintiff in 'consideration' of him taking care their aged mother. The agreement was not honoured. I dismissed his application for damages for breach of that agreement and I relied on a Singapore Court of

Appeal case of *Choo Tiong Hin & Ors v Choo Hock Swee* [1959] 1 MLJ 67 where Whyatt CJ held that the question in every case is whether the law will imply, from the circumstances of the case, a common intention that the agreement is to be attended with legal consequences. His Lordship then answered it in the negative for the agreement in that case which is similar with the present case before me, which was to give equal possession of a farm and other businesses of the respondent if the appellant agreed to be adopted by the respondent and work with him on the said farm and businesses. His Lordship quoted from *Balfour v Balfour* [1919] 2 KB 571 at p 579 to emphasise his point where Atkin LJ said, 'Agreements such as these are outside the realm of contracts altogether … The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts'. The context in which that was said was a verbal agreement between the husband and wife to give her a monthly maintenance whilst he was abroad. His Lordship said that arrangements such as that between the husband and wife are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. His Lordship further said:

> All I can say is that the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligation.

[10] That's exactly the very point which I was trying to make earlier when I commented about having our work cut out for us.

STRIPPED DIRECTORSHIP

[11] In considering this particular allegation, I keep it uppermost in my mind this relevant excerpt from in *Re Kong Thai Sawmill*'s judgment where it states:

> (v) Secondly, for the case to be brought within section 181 (a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. *Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority or in disregard of their interests, that the section can be evoked. As was said in a decision upon the united Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made* (*Elder v Elder & Watson Ltd* [1952] SC 49: Their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the

> proper company procedure (per Lord Clyde in *Thompson v Drysdale* [1925] SC 311, at p 315). Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line. (Emphasis added.)

[12] Other than this 'majority rule' factor as underlined in the quotation above, I also bear in mind that these are family owned companies which were started by the family patriarch. Unlike the two other companies which I have ordered wound up, there are three directors for each defendant company herein and only two in the wound up companies. Obviously when two directors could not see eye to eye, there would be a deadlock in the management which justified, in my view, the winding up orders. In this case, the removal of the son was pursuant to a properly constituted extraordinary general meeting and the majority in the two companies have spoken against him. I see no reason why the views of the majority should be silenced or should not be respected.

[13] In fact given the escalating tension between the father and son, the latter's removal as directors were for the greater good of the two companies. His removal as directors, in other words, have not 'passes over' as oppression as he alleged.

SIPHONING OF COMPANY'S FUND

[14] It is a little too late in the day to bring up this issue as the transfer of the land by the other son to the father was done in October 2007 and the son made no complaints of it within a reasonable time after the transaction. He only raised it now when his request for a share in the land following his father's earlier promise to him that he would be given it was turned down. Further, for this alleged illegality the proper victim is the first defendant, not him. Thus, he could not be said to have been oppressed by the alleged use of company's funds by his father and the latter's failure to honour his promise for the share in the land falls under the same consideration as the earlier discussed failed promise on the 50% shares in the two companies. In this regard, what Richard Malanjum CJ (Sabah and Sarawak) said in *Pan Pacific*'s case aptly applies in this case:

> [41] It has also been held that merely establishing that a respondent has, in breach of its fiduciary duty brought about a transaction involving the assets of the company which had benefited the majority shareholder would not suffice to enable a petitioner to obtain an order under s 459 of the English Companies Act 1985 unless the petitioner could show that it had suffered loss by reason of the transaction. (See: *Rock Nominees Ltd v RCO (Holdings) plc* [2004] 1 BCLC 439).

A NON-DECLARATION OF DIVIDENDS

[15] I note that the son's allegation that he has not been paid any dividend by the two companies in para 31 of his affidavit in support was merely answered in para 17 of his father's affidavit in opposition by a general denial as follows:

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> In reply to para 31 of the Affidavit In Support, I verily deny the several allegations in the said paragraph and the plaintiff is put to strict proof thereof.

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[16] Now although the son did not file any affidavit in reply, it is clear to me that the general denial of the father is not good in law because not being paid a dividend is a negative fact and being one, it is incapable of proof as epitomised by the Latin phrase *ei qui affirmat non ei qui negat incumbit probatio* which means the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it: for a negative is usually incapable of proof. So now I ask myself, is this allegation sufficient evidence to constitute oppression? I would still answer it in the negative for these reasons:

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(a) the alleged non-payment of dividend suffers a lack of particulars. The son did not say for which year the dividends were not declared or paid. If it were since he joined the two companies at the end of 2003 and prior to his removal as directors of the companies, then this fact could not be held adversely against the defendants for his long silence over the issue tantamounts to an acceptance of the same. It would be inequitable to raise this alleged fact against the defendants now after this long lapse of time and I am certain that estoppel by conduct should preclude him from raising it only after he is no longer in the management of the companies. He was, in other words, complicit in the complained act after all; and

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(b) the non-payment of the dividends were not raised as an exception, that is, only he has not been paid whilst the other shareholders have been given their dues. If this were so, then it is a clear act of oppression of the minority. Bearing in mind again the legal requirement that the son bears the burden of proving oppression, I am not convinced that his bare allegation here which is devoid of particulars should justify winding up these two family-owned companies. To do so would not be in the interest of the other shareholders and I would even dare say, justice as well.

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[17] Considering the allegations levelled against the defendants against the backdrop that the two companies are family owned and started from scratch by the patriarch of the family, to grant the wish of the plaintiff to wind them up would be akin to cutting one's nose to spite one's own face.

[18] Thus, I would dismiss his application and in the absence of any agreement on costs, I fix the same at RM8,000.

Application dismissed with costs of RM8,000.

Reported by Afiq Mohamad Noor